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No. 95-1971

In The

Supreme Court of the United States

October Term, 1995

VILLAGE OF CHAGRIN FALLS, OHIO,

Petitioner,

vs.

RONALD W. KRUSE,
SYLVIA A. KRUSE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ELI MANOS
(Counsel of Record)
MICHAEL T. GAVIN
ANTHONY J. COYNE
MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.
55 Public Square – Suite 2150
Cleveland, Ohio 44113
(216) 523-1500

DAVID R. JONES
5 South Franklin Street
Chagrin Falls, Ohio 44022
(216) 247-2380

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

QUESTIONS PRESENTED FOR REVIEW

Does the seizure of private property and its conversion to a public road by a municipal corporation without warning, notice or payment of compensation to the owners offend the substantive and procedural guarantees vested in citizens of the United States by the Due Process Clause of the Fourteenth Amendment and the Due Process and Takings Clauses of the Fifth Amendment to the Constitution of the United States of America.

Has the Congress of the United States vested jurisdiction in the United States courts of a case complaining that a municipal corporation has taken private property and devoted it to its own use without notice or securing compensation, albeit a remedy is available to the complainant through the common law of the state to charge the municipal corporation with violating the Constitution of the United States and of the state and to compel it to institute proceedings to appropriate the seized property and pay compensation therefor.

Does a municipal corporation deprive a citizen of rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to observe procedures enacted by the General Assembly of the State of Ohio requiring notice, negotiation and other conduct with respect to an owner of private property prior to taking such property.

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CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution

> No person shall be . . . , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, . . .

STATUTES ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO

Ohio Revised Code, § 163.04

Ohio Revised Code, § 163.06

Ohio Revised Code, § 163.59

Ohio Revised Code, § 719.04

Ohio Revised Code, § 719.05

STATEMENT OF THE CASE

Judge Batchelder vividly depicted the events precipitating this case at 74 F.3d 695[1], as follows:

> One afternoon in June of 1986, the Kruse family of Chagrin Falls returned home to discover, to their intense amazement and dismay, that their backyard was missing. The back of their property had been laid waste, and the family's house was hanging at the edge of a precipice where their lawn, trees and other landscaping had been when they left home that morning. Agents of the Village had been busily at work that day, devastating the Kruses' yard and carting off tons of soil excavated from the property, as well as the family's trees, bushes, and other plantings.
>
> The excavated land was, long ago, part of Old State Street; however, the Village had formally vacated the street in the mid-1800's. The vacated street was disused, and the Village had permitted building on the property. When the Kruses protested the destruction of their property, the Village authorities responded that they presumed that the Village owned the vacated street (even though it had granted a building permit to the Kruses' predecessors in title to build an extension on what had been the street, and even though the Village was aware of the Kruses' occupancy). The Village had determined to commence a little roadwork across the Kruses' backyard but had not given the owners any notice of its plan to consume their yard as part of a street widening program.

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[1] *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694 (1996).

The Village[2] insisted that it and not the Kruses owned the land and denied the Kruses' request for redress. The Kruses brought an action in the Court of Common Pleas of Cuyahoga County, Ohio, demanding that title to the land be quieted in their name, that the taking be enjoined, and that they be awarded damages. That court granted summary judgment to the Kruses quieting title to the land in their name and overruled the Village's motion for summary judgment on the issue of damages. The street widening having been completed, the request for injunction had become moot. The Village appealed to the Court of Appeals of Cuyahoga County, Ohio, which in an unreported opinion affirmed the grant of summary judgment quieting title to the land in the Kruses but reversed the denial of summary judgment to the Village on the issue of damages, and rendered judgment for the Village on that issue by reason of sovereign immunity. The decision overruling the damage claim is consistent with the latest pronouncement of the Ohio Supreme Court on the question, in which it held an action for damages may not be maintained against a municipality by reason of unconstitutional restrictions on the use of property. *Superior Uptown, Inc. v. Cleveland*, 39 Ohio St. 2d 36 (1974). The Village appealed to the Ohio Supreme Court, which declined jurisdiction.

In spite of the Kruses' continuing requests, the Village declined to appropriate the property, and so the Kruses brought this action in the United States District Court for the Northern District of Ohio, alleging deprivation of property without due process on both substantive

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[2] Petitioner is referred to as the Village or Chagrin Falls.

and procedural grounds, and a taking without compensation. The district court dismissed the Kruses' complaint, asserting that they must first exhaust the procedures available under state law. The Sixth Circuit reversed, holding that the district court was vested with jurisdiction over this matter, a taking of private property for a public purpose through physical occupation without the payment of compensation.

ARGUMENT

Ten years have elapsed since the Kruses were dispossessed of their land by the Village. That this case evinces deprivation of property without due process is incontrovertible. The Village has ignored the Kruses' due process claim and has focused on the Takings Clause of the Fifth Amendment. It asks this Court to accept jurisdiction so as to find that its action in seizing the Kruse property does not offend the Takings Clause in spite of the lapse of ten years without payment.

Without acknowledging that payment is due, it argues that payment is not required until compelled by state judicial process (Petition, p. 11). It directs this Court to the case of *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St. 3d 104 (1994), suggesting that in that case the Ohio Supreme Court held that inverse condemnation procedures are available in Ohio (Petition, p. 10) through mandamus (Petition, p. 7), which it refers to as "Ohio's statutory scheme for seeking compensation" (Petition, p. 9). In *State ex rel. Levin v. Sheffield Lake*, the court reviewed a mandamus action brought to compel the trial court

before which an earlier action was pending to issue a writ of mandamus directing appropriation. The Ohio Supreme Court held that mandamus was an appropriate remedy to compel appropriation. Doing so, it made an exception to its established doctrine that mandamus may not be utilized to compel legislative action. *State ex rel. Town & Suburb Development Co. v. Maser*, 172 Ohio St. 505 (1961); *State ex rel. Keville v. Faurot*, 126 Ohio St. 646 (1933). The Ohio Supreme Court cited to support its holding that the remedy of mandamus is appropriate to compel appropriation *State ex rel. McKay v. Kauer*, 156 Ohio St. 347 (1951); *Wilson v. Cincinnati*, 172 Ohio St. 303 (1961); *In re Appropriation of Easement for Hwy. Purposes*, 175 Ohio St. 107 (1963). These cases concerned administrative action by the director of highways, not legislative action. Nowhere in the opinion in *State ex rel. Levin v. Sheffield Lake* does the court mention the phrase "inverse condemnation," nor does it review the adequacy of the remedy for the purpose of the Takings Clause; and, since the initial mandamus action filed in that case had been pending for ten years, it certainly did not find the remedy adequate.

The Village asserts that the Sixth Circuit in this case should have deferred to the decision of the Ohio Supreme Court in *State ex rel. Levin v. Sheffield Lake*, but that court made no finding on the federal question of the adequacy of mandamus as a remedy for purposes of the Takings Clause. Moreover, even in diversity cases, resolution of federal issues is vested in the courts of the United States. *Budinich v. Becton Dickinson and Company*, 486 U.S. 196, 198 (1988).

Mandamus is not a statutory scheme, but rather a common law remedy dating from the thirteenth century.

State ex rel. Moyer v. Baldwin, 77 Ohio St. 532, 537-538 (1908). The Village also argues that an inverse condemnation action is available in Ohio, and presumably in every state in the union, by reason of this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987), that an inverse condemnation action may be brought by reason of the self-executing characteristics of the Fifth Amendment. Citing language of the court in *Villager Pond, inc. v. Town of Darien*, 56 F.3d 375, 380 (CA2 1995), the Village argues that an additional source for an Ohio remedy is available through Article I Section 19 of the Ohio Constitution, which it contends provides a self-executing remedy in inverse condemnation. Every state constitution, of course, has provisions similar to Section 19 of the Ohio Bill of Rights (Article I), mandamus is available in every jurisdiction in this country and, of course, this Court's decision in *First English Evangelical Lutheran Church* controls the proceedings in all of the states. The Village is requesting this Court to take jurisdiction on this case in the expectation that it will divest the federal courts of jurisdiction in all cases claiming substantive deprivation of property without due process in defiance of the Takings Clause and the Due Process Clause.

Congress, however, has explicitly vested jurisdiction in the courts of the United States to redress tortious violation under the color of state law of rights guaranteed to the citizens of the United States by the Constitution, irrespective of the availability of a remedy under state law, and without requiring that state remedies be pursued prior to the invocation of the federal remedy. *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part on the

unrelated issue of municipal liability in *Monell v. New York City Dept. of Social Services*, 436 U.S. 664 (1978); *Zinermon v. Burch*, 494 U.S. 113 (1990); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 427 (1987); *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972); *McNeese v. Board of Education for Community Unit School District 187, Cahokia, Illinois*, 373 U.S. 668 (1963).

The Village attempts to avoid the consequence of these cases by twisting the "ripeness" concept enunciated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), relating to regulatory takings. It cannot seriously be advanced that the Kruses' claim of constitutional tort is not ripe. The Village has seized the land, widened the street and, although ten years have elapsed, has not paid compensation. This is not a case, as in *Williamson County*, in which this Court reviewed the effect of the land use regulation upon property, but rather a physical occupation and seizure of property and its application to public use, and so incontrovertibly a taking for which the Constitution requires compensation. *Yee v. City of Escondido, California*, 112 S.Ct. 1522 (1992); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897), this Court, relying upon Justice Story at 2 *Story Const. § 1956*, held, "that the power to appropriate was subject to the restriction, among others, that it must not be exercised without making due compensation for whatever is taken, says: 'Due

process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed, . . . ' " In substituting judicial redress for legislative action, the Village has blurred the constitutional compact establishing separation of powers. The Takings Clause contemplates legislative action to provide the procedure for compensation. The requirement is not satisfied by judicial admonishments rectifying unconstitutional omissions.

The responsible authority is the Council of the Village, but it has neither authorized the appropriation of the Kruse property nor has it appropriated money to pay for it. That payment is available may not be assumed. The frontiersmen who drafted the Ohio Constitution did not have faith in the credit of government. In Section 19 of the Bill of Rights (Article I), they required payment to be made prior to the possession and transfer of title of property appropriated to a public use, providing exceptions for times of war, public exigency or the construction of roads, in which event a deposit in court is required of an amount equivalent to the fair market value of the property being taken. The clause in Section 19 providing for payment states, "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; . . . ."

The risk that the Kruses will not be paid is magnified by the fact that the credit of the state is not behind the Village. Under Ohio law, Chagrin Falls has the status of a city state with respect to the exercise of its power of eminent domain. The Home Rule Amendment to the Ohio Constitution, Article XVIII Section 3, vests a municipality

with all powers of local self government, including the power to acquire property by appropriation or otherwise. *State ex rel. Bruestle v. Rich,* 159 Ohio St. 13 (1953). The state legislature is bereft of authority to intervene. The court held at 159 Ohio St. 32, "[T]here is no provision of the Ohio Constitution which authorizes the interference by general laws with the exercise by a municipality of its power of eminent domain. . . . "

The Ohio legislature has provided no remedy to the Kruses. It is without authority to provide a remedy. The General Assembly has not provided for compensation from its own coffers to persons like the Kruses whose property has been seized by a subdivision of the state, nor can it compel a municipality to pay for what it has taken. The decision of the Sixth Circuit in this case that Ohio has not provided a remedy through inverse condemnation for the taking of private property by the public is manifestly correct and is not likely to be disturbed by this Court. The obligation to obey the Due Process Clause and the Takings Clause as well as the Ohio Constitution is with the Village. Its failure constitutes a violation of constitutional guarantees made to the Kruses, to whom Congress has provided a remedy through enactment of the Civil Rights Act.

The Village attempts to avoid the multiple holdings of this Court that the jurisdiction of the federal courts in civil rights actions is not dependent upon exhaustion of state remedies through misemployment of the concept of "ripeness" enunciated by this Court in *Williamson County,* in which it held that the action brought pursuant to the

Civil Rights Act by a developer of a subdivision in Tennessee claiming a taking of its property through confiscatory land use regulations was premature and not ripe for adjudication by the federal courts either pursuant to the Due Process Clause or the Takings Clause, in that a final administrative decision had not been made by the Williamson County Board of Zoning Appeals, which had not been asked to consider certain variances available to the developer. Drawing upon its holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court went on to state that the Taking claim would not be ripe for adjudication until the owner had exhausted state procedures for obtaining compensation and been denied. The broad language of this Court is appropriate to regulatory takings, but not to the surprise physical invasion and expropriation of private property by government without provision for compensation. In *Parratt*, this Court held that an adequate post-deprivation remedy satisfied the Due Process Clause under facts where a pre-deprivation hearing was not feasible because the loss occurred through random and unauthorized acts of a state agent.

A pre-deprivation hearing is obviously impracticable in assessing the effect of a land use regulation upon property. The restrictions are imposed to operate uniformly throughout a zoning district. It may be that when applied to a piece of property, a restriction may be found arbitrary, capricious and unreasonable without advancing a legitimate governmental interest. *Nectow v. Cambridge*, 277 U.S. 172 (1928). It is readily apparent, however, that investigation regarding all the properties that might be affected by a regulation prior to its going into effect is impracticable and of doubtful benefit. Therefore, the only

practical remedy is through a post-deprivation proceeding. To support its position in *Williamson County*, this Court cited precedents involving problematic takings which held that compensation was assured through the credit of the United States, which was incorporated into the legislation authorizing the potential taking, if not explicitly, at least by implication. *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984) (possible loss of trade secrets); *Blanchette v. Connecticut General Insurance Corporations*, 419 U.S. 102 (1974) (possible erosion of assets); *Hurley v. Kincaid*, 285 U.S. 95 (1932) (possible flooding); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (possible erosion of assets).

The taking of the Kruse property was not problematic, but definite. Compensation was neither made nor secured. The deprivation occurred with the seizure. After ten years, it is highly unlikely that this Court will decide that due process is not culminated until state judicial remedies are exhausted. *Williamson County* does not lead to this absurd result. Concerned about the *res judicata* implications of this Court's holding in *Williamson County*, the court noted in *Dodd v. Hood River County*, 59 F.3d 852 (CA9 1995), at page 860:

> Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.

The Village attempts to provide a Parrattic element to this case by describing the taking as accidental (Petition, p. 8).

The facts belie accident. The Village knew that the Kruses occupied the property; that the knoll upon which it was situated supported the residence; had even granted a building permit to extend the house onto vacated State Street; and yet without warning, deliberately directed its contractor to level the hillside and to cut down the trees, bushes and other vegetation on the property. The concept of ripeness is inapplicable to this case. The facts are known; there is nothing more to be learned. Unlike the situation in *Williamson County*, there is no question that the Kruses have suffered a taking and are entitled to compensation. They are also entitled to invoke the jurisdiction of the federal courts to obtain redress.

The Petition ignores the due process claims of the Kruses. The expropriation of their land without warning offends the scope of liberties guaranteed by the Due Process Clause. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977), adopting Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), at 542-543. It constitutes official conduct which "shocks the conscience" *Rochin v. California*, 342 U.S. 165, 172 (1952).

The Kruses also asserted a procedural due process deprivation by reason of the failure of the Village to follow the process prescribed by Ohio law for the appropriation of property. The Due Process Clause originates from Chapter 39 of the Magna Carta, in which King John agreed not to dispossess any free man except "by the law of the land." *Letwin, The Economic Policy of the Constitution*, reprinted in *Paul & Dickman, Liberty, Property and the Foundations of the American Constitution* (State University of New York Press 1989). The guarantees of the Due Process Clause entitled the Kruses to be notified of the

imminent taking of their property and to be granted the opportunity to be heard prior to the taking. *Cleveland Board of Education v. Laudermill*, 470 U.S. 532, 542 (1985). It also vests the entitlement to the Kruses that the procedures established by state law be followed. *Zinermon v. Burch, supra*. Section 719.04 of the Ohio Revised Code[3] required that the Council of the Village pass a resolution declaring the intent to appropriate the Kruses' property for road purposes. Section 719.05 provides that the resolution of intent be served prior to the enactment of an ordinance authorizing the appropriation. The Charter of the Village at Section 2 of Article II incorporates the general laws of the state of Ohio when not inconsistent with the Ordinances of the Village. Section 163.59 requires the Village to procure an appraisal of the property from an independent fee appraiser and to offer an amount not less than the appraisal. Further, it prohibits the taking of possession of the property until an agreed price is paid or the amount of the appraisal is deposited in court. Section 163.04 requires negotiation with the owner. Section 163.06(A) implements the constitutional requirement that prior to taking possession, the appraised value of the property be deposited in court.

The Village has ignored the law of the land in its dealing with the Kruses. The decision of the Sixth Circuit in this case should be affirmed and the district court directed to conclude this matter and provide the Kruses

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[3] References are to Ohio Rev. Code Ann. (Anderson 1991) and Ohio Rev. Code Ann. (Baldwin 1994).

with the compensation that they should have been paid ten years ago.

CONCLUSION

The claim of conflict raised by the Village between the decision of the Sixth Circuit in this case and the decisions in the cases cited in the Second, Seventh, Ninth and Eleventh Circuits is illusory (Petition, p. 5). All of those cases involved the application of land use regulations to the properties concerned and not physical expropriation of property for a public purpose. None held that the common law writ of mandamus constitutes an adequate inverse condemnation remedy to be exhausted prior to asserting the federal claim. None held that physical seizure of property for a public purpose did not constitute a deprivation or a taking without compensation absent pursuit of the state court remedies.

The Village urges this Court to accept jurisdiction so that it may impose upon the Constitution the procedural niceties heretofore applied by the Court in consideration of regulatory takings to takings physically occupying

property. Such a holding would offend traditional values of this republic. The Petition should be denied.

Respectfully submitted,

ELI MANOS
(Counsel of Record)
MICHAEL T. GAVIN
ANTHONY J. COYNE
MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.
55 Public Square – Suite 2150
Cleveland, Ohio 44113
(216) 523-1500

DAVID R. JONES
5 South Franklin Street
Chagrin Falls, Ohio 44022
(216) 247-2380

Attorneys for Respondents

§ 163.04 Appropriation.

Appropriations shall be made only after the agency is unable to agree, for any reason, with the owner, or if more than one, any owner, or his guardian or trustee, or when any owner is incapable of contracting in person or by agent and has no guardian or trustee, or is unknown, or is not a resident of this state, or his residence is unknown to the agency and cannot with reasonable diligence be ascertained.

§ 163.06 Deposit with court; appraisal of structures.

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

* * *

§ 163.59 Land acquisition policies.

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many state and federally assisted programs, and to promote public confidence in public land acquisition practices, heads of acquiring agencies shall, to the greatest extent practicable, be guided by the following policies:

(A) The head of an acquiring agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(B) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value. As used in this section, "appraisal" means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specified date, supported by the presentation and analysis of relevant market information.

(C) Before the initiation of negotiations for real property, the head of the acquiring agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's

approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the acquiring agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(D) No owner shall be required to surrender possession of real property before the acquiring agency concerned pays the agreed purchase price, or deposits with the court for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(E) The construction or development of a public improvement shall be so scheduled that no person lawfully occupying real property shall be required to move from a dwelling, or to move his business or farm operation, without at least ninety days' written notice from the head of the acquiring agency concerned, of the date by which such move is required.

(F) If the head of an acquiring agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(G) In no event shall the head of an acquiring agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(H) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the acquiring agency concerned shall institute formal condemnation proceedings. No acquiring agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(I) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the acquiring agency concerned shall offer to acquire that remnant. For the purposes of this division, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the agency concerned has determined has little or no value or utility to the owner.

§ 719.04 Resolution declaring intent to appropriate.

The legislative authority of a municipal corporation shall, whenever it is deemed necessary to appropriate property, pass a resolution declaring such intent, defining the purpose of the appropriation, and setting forth a pertinent description of the land and the estate or interest therein desired to be appropriated.

§ 719.05 Proceedings on passage of appropriation resolution.

The mayor of a municipal corporation shall, immediately upon the passage of a resolution under section 719.04 of the Revised Code, declaring an intent to appropriate property, for which but one reading is necessary, cause written notice to be given to the owner of, person in possession of, or person having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent. Such notice shall be served by a person designated for the purpose and return made in the manner provided for the service and return of summons in civil actions. If such owner, person, or agent cannot be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the municipal corporation, and the legislative authority may thereupon pass an ordinance by a two-thirds vote of all members elected thereto, directing such appropriation to proceed.